Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: 07/14/97
CASE NO:96-INA-063

In the Matter of:

VALENTE AIR EXPRESS INC.
Employer

On Behalf of:

ROSANA POLLO
Alien

Appearance: Harlan E. Shackner, Esquire
West Orange, NJ
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not

adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27(c).

Statement of the Case

On April 27, 1994, Valente Air Express Inc. ("employer") filed an application for labor certification to enable Rosana Pollo ("alien") to fill the position of Purchase Price Analyst at a yearly wage of $35,000 (AF 74). The job duties are described as follows:

> Compiles and analyzes statistical data of company to determine feasibility of buying supplies and for pricing of services for the general public and for contract transactions. Compiles information from periodicals, catalogs, competitive services and other sources to keep informed on price trends. Obtains data for cost analysis studies by determining operating costs within divisions of company. Confers with customers and analyzes customers operations to determine factors that affect prices. Prepares reports, charts and graphs of findings. Evaluates findings and make[s] recommendations to personnel. Recommends use of alternative materials, operating procedures and methods to reduce costs. Uses knowledge of billings, custom regulations, international traffic tariffs and tracking to perform studies and make recommendations, develops procedures for effecting new accounting management controls and modifications of existing in place systems.

The job requirements are two years of experience in the job offered or in the related occupation of Purchase Price Analyst-Trainee.

On June 22, 1995, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited a violation of §656.21 (b) (5) which requires the employer to document that the requirements are the minimum necessary for the performance of the job. The CO observed that the employer required two years of experience in the job offered or in the related experience as a Purchase Price Analyst-Trainee. The CO noted that the alien had no experience in the job offered before her employment with the employer. The CO therefore requested the employer to document why it is not feasible to train another worker for the position or submit evidence which clearly shows that the alien at the time of hire had the qualifications which the employer is now requiring.

In rebuttal, dated July 17, 1995, the employer argued that it is infeasible to train a worker for the offered position. The employer, which is a small air freight company, explained that at the

[1] All further references to documents contained in the Appeal File will be noted as "AF."

time the alien was hired, the company had the personnel and resources to train workers. Since that time, however, the company has undergone substantial organizational change in an effort to lower its labor costs to compete more effectively with national air freight carriers. The employer stated that many national freight companies have lowered their operating expenses and thus enjoyed rising profits. In order to compete, the employer lowered operating expenses and maximized utility by using all available workers to perform the jobs for which they were trained (AF 66). The owner of the company stated that he personally trained the alien, but cannot train a new worker for the offered position because he dedicates his time to the increased financial and administrative affairs of the company. Finally, the owner reported that since the hiring of the alien, business income has risen by 55% and the total amount of the payroll has expanded by 60% (AF 66).

The CO issued the Final Determination on July 28, 1995 denying the labor certification. The CO concluded that rebuttal does not demonstrate adequately why it is not feasible to train another worker at this time. The CO noted that the company has expanded substantially and experienced a rise in business profits and an increase in the size of its workforce. The CO reasoned that "a company that has experienced the level of growth demonstrated by employer in the short time since the alien was hired would have proportionately developed the ability to train as is customary with growth and development" (AF 75).

On August 17, 1995, the employer submitted a Request for Reconsideration which the CO subsequently denied on September 25, 1995. Thereafter, the employer requested review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 2).

Discussion

The issue presented by this appeal is whether the employer specified the minimum job qualifications for the offered position pursuant to § 656.21 (b) (5).

Section 656.21 (b) (5) provides that an employer is required to document that its requirements for the job opportunity are the minimum necessary for the performance of the job and that the employer has not hired or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer. This section addresses situations where the employer requires more stringent qualifications for a U.S. worker than it requires of the alien, and prevents the employer from treating an alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a/ Bayside Motor Inn,* 89-INA-105 (Feb. 14, 1990). It is well settled that an employer violates § 656.21 (b) (5) if it hired the alien with lower qualifications than it specified on the labor certification application, unless the employer demonstrates that it is infeasible to train U.S. workers. *See Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 88-INA-104 (Dec. 22, 1988). Furthermore, the Board has held that under § 656.21 (b) (5), an employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for the employer in the same job. *Central Harlem Group, Inc.,*

89-INA-284 (May 14, 1991).

In this case, the employer did not dispute the CO's finding that the alien gained the requisite experience for the offered position while working for the employer. Instead, the company argued that it was not feasible to train another worker for the position because it has experienced substantial business growth. The Board has held that an increase in the volume of business or general growth and expansion, by itself, is insufficient to establish infeasibility. Moreover, unless an employer proves otherwise, increased training capability is presumed to accompany growth. *See Super Seal Manufacturing Co.*, 88-INA-417 (Apr. 12, 1989) (*en banc*); *AEP Industries*, 88-INA-415 (Apr. 4, 1989) (*en banc*); *Green Kitchen Restaurant*, 91-INA-259 (July 17, 1992) (increased capability is presumed to accompany growth). The presumption established by these cases is applicable to the instant case as the employer indicated that since the time of the alien's hire, the company has realized over 50% increases in both business income and the size of its workforce.

We believe this case is analogous to the Board's decision in *Pueblo Automotive, Inc.*, 93-INA-505 (March 8, 1995). In that case, the employer applied for labor certification to enable the alien to fill the position of Mechanical Engineer. The employer readily acknowledged that the alien had obtained the required experience while working for the company, but maintained that it was infeasible to train a U.S. worker for the offered position due to its substantial increase in business transactions. Despite the employer's claim of infeasibility, the Board affirmed denial stating that an increase in volume of business is insufficient in carrying the employer's burden of proof. Following the precedence of *Pueblo Automotive,* we hold that the employer in the instant case has failed to establish infeasibility. Accordingly, we conclude that labor certification properly was denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.